

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION**

ECOFACOR, INC.,

Plaintiff,

v.

GOOGLE LLC,

Defendant.

Civil Action No. 6:20-cv-00075 (ADA)

JURY TRIAL DEMANDED

**GOOGLE LLC'S STATEMENT REGARDING MOOTNESS OF PLAINTIFF'S
MOTION TO STRIKE EXPERT OPINIONS ON NON-INFRINGEMENT ALTERNATIVES**

Defendant Google LLC (“Google”) files this statement in response to Plaintiff EcoFactor’s (“EcoFactor”) Motion to Strike Expert Opinions on Non-Infringing Alternatives (ECF 109 (unsealed version) and 110 (sealed version)). Plaintiff’s motion should be denied as moot because it concerns a non-infringing alternative that Google has agreed not to pursue or present at trial.

Specifically, EcoFactor’s motion relates to a non-infringing alternative discussed in the Rebuttal Expert Report of Dr. Don Turnbull Regarding Non-Infringement of U.S. Patent Nos. 8,412,488, 8,738,327, and 10,534,382 (“Google’s Non-Infringement Expert Report”) and relied upon at paragraph 174 of the Expert Report of W. Todd Schoettelkotte Relating to EcoFactor’s Damages (“Google’s Damages Expert Report”). This non-infringing alternative was identified in EcoFactor’s Motion: “the algorithm utilized by the HVAC Monitoring features could be modified to remove the use of calculated inside temperature and instead utilize a calculated enthalpy to represent both the indoor and outdoor environments.” ECF 109 at 1 (quoting Google’s Non-Infringement Expert Report at ¶ 454).

On December 1, 2021, Google represented to EcoFactor in writing that Google no longer intended to rely on this non-infringing alternative at trial and asked EcoFactor to withdraw its motion on mootness grounds. *See* Ex. A. On December 2, 2021, EcoFactor responded, requesting that Google file a notice of non-opposition stating that the expert opinions concerning the modified design of the HVAC Monitoring algorithm that utilizes enthalpy were withdrawn “thereby mooting the motions.” *Id.*

Because the only relief sought in Plaintiff’s Motion to Strike Expert Opinions on Non-Infringing Alternatives relates to a non-infringing alternative that utilizes enthalpy, which will not be pursued by Google in this case, this Court should deny EcoFactor’s motion as moot. *See*,

e.g., *Click-to-Call Technologies LP v. Ingenico, Inc.*, 2021 WL 4692404, at *2 (W.D. Tex. Aug. 30, 2021) (denying motion to exclude expert testimony after granting motion for summary judgment of invalidity); *Kinetic Concepts, Inc. v. Bluesky Med. Corp.*, 2010 WL 11463274, at *1 (W.D. Tex. Oct. 18, 2010) (denying motion for judgment as a matter of law of no patent infringement as moot after ruling that the patents in suit were invalid as obvious); *Lemaire Illumination Technologies, LLC v. HTC Corp.*, 2019 WL 1489065, at *3 (E.D. Tex. Apr. 4, 2019) (denying motion for partial judgment on the pleadings as moot because it only addressed claims that had subsequently been disclaimed).

Date: December 3, 2021

Respectfully submitted,

By: /s/ Bijal V. Vakil

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Counsel for Google LLC

CERTIFICATE OF SERVICE

Pursuant to the Federal Rules of Civil Procedure and Local Rule CV-5, I hereby certify that, on December 3, 2021, all counsel of record who have appeared in this case are being served with a copy of the foregoing via electronic mail.

Dated: December 3, 2021

/s/ Bijal V. Vakil
Bijal V. Vakil